IN THE HIGH COURT OF JUDICATURE AT BOMBAY

O.O.C.J.

APPEAL NO.739 OF 2006
IN
ARBITRATION PETITION NO.359 OF 2006

M/s. LASA .. Appellants
v/s.
Harilal Savji Patel (HUF)
Partner of M/s. Choice Centre,
Through it's Karta Shri Harilal Savji Patel
and others. .. Respondents

Mr. Virag Tulzapurkar, senior counsel with Mr. Tejas Vora i/by Mr. Rajesh Singh for the appellants.

Mr. Milind Vasudeo with Ms. Suman Jain for the respondent No.1.

Mr. D.D. Madon, senior counsel with Mr. Bharat Joshi for the respondent Nos.2 to 6.

Mr. K.D. Rane, S.O. from Court Receiver's office.

CORAM : R.M.LODHA &
S.A.BOBDE, JJ.

DATED : 10TH OCTOBER, 2006.

ORAL ORDER (Per R.M. Lodha, J.)

We heard the senior counsel for the appellants and the counsel for the respondent No.1 for some time.

2. The appellants are, admittedly, not party to the partnership agreement entered into between the respondent No.1 and the respondent Nos.3 to 6. By the partnership agreement dated 1st April, 2000 (we are not referring to the earlier partnership deeds), the respondent No.1 and the respondent Nos.3 to 6 started carrying on business in partnership in the firm name and style of M/s.Choice Centre. Admittedly, the partnership has been dissolved on 26th June, 2006. That the partnership agreement contains the arbitration clause is not in dispute. The present respondent No.1 filed the arbitration petition (359 of 2006) under section 9 of the Arbitration and Conciliation Act, 1996 praying for the following reliefs:-

> "(a) Pending the hearing and final disposal of the above Petition and the Arbitration Proceedings it may be declared that the Partnership business viz. Choice Centre stands dissolved with effect from 27th June 2006.
>
> (b) Pending the hearing and final disposal of the above Petition and the Arbitration proceedings it may be declared that the agreements both dated 1.5.2006 be set aside and further the said agreements be declared void ab-initio both dated 1.5.2006.
>
> (c) That this Hon'ble Court be pleased to appoint Court Receiver, High Court, Bombay as Receiver with all powers under Order 40 of the Code of Civil Procedure, in respect of the said Partnership Property, stock/articles described in "Exhibits-F" hereto.
>
> (d) This Hon'ble Court be pleased to

restrain the Respondents from in any manner dealing with, parting with, encumbering or creating any third party rights in respect of the said Partnership Property, stock/articles described in "Exhibit-F" hereto.

(e) This Hon'ble Court be pleased to restrain the Respondents No.6 from acting in furtherance of the agreements both dated 1.5.2006."

3. In the said arbitration petition, the present appellants were also impleaded as respondent No.6 as the licence to use the furniture of the firm was given by one of the partners to the appellants and also the appellants were permitted to use the firm name.

4. The learned Single Judge, after hearing the parties, passed the following order on 29.8.2006:-

"1. By consent of parties Hon'ble Mr. Justice V.P. Tipnis (Retired) having address at 201/A, "Prachi" Juhu Versova Link Road, Andheri (W), Mumbai-400 053 is appointed as Sole Arbitrator and dispute between parties are referred to the learned Arbitrator.

2. Receiver of this Court is appointed as receiver of the business of respondent No.1 firm. Receiver shall take possession of the business and assets of the firm from whomsoever it may be in possession. Receiver shall, thereafter, call bids for appointment of agent of the receiver for carrying on business of the firm. Highest bidder shall be appointed as an Agent. Parties shall be at liberty to apply for interim relief before the learned Arbitrator."

5. The respondent No.6 in the arbitration petition who is not party to the partnership agreement has come up in appeal. In the appeal, the challenge is to the direction given by the learned Single Judge to the Receiver to take possession of the business and assets of the firm from whomsoever it may be in possession. The case of the appellants is that the premises mentioned in para 13 of the petition, which were initially with the firm on the leave and licence were surrendered by the respondent No.2- managing partner of the firm to the owners of the premises and the said premises were taken on leave and licence by the appellants on 1.5.2006. The furniture of the partnership firm, according to the appellants, was given on licence by the managing partner of the firm vide agreement dated 1st May, 2006. The contention of the senior counsel for the appellants is that while issuing the direction to the Court Receiver to take possession of the business and assets of the firm from whomsoever it may be in possession, the appellants' possession in the premises based on leave and licence agreement and the user of the furniture under the licence agreement dated 1st May, 2006 executed by the managing partner of the firm, shall be seriously and prejudicially affected and that cannot be done in exercise of the power under section 9 of the Arbitration and Conciliation Act, 1996. The senior counsel for the appellants also contended that the appellants being not party to the partnership agreement, cannot be a party to the arbitration proceedings and in the arbitration proceedings, the two agreements dated 1st May, 2006 cannot be annulled and what cannot be done finally in the conclusion of the arbitration proceedings, cannot be done in the proceedings under section 9 of the Arbitration and Conciliation Act, 1996.

6. The senior counsel for the appellants relied upon our order dated 5th September, 2006 passed in Appeal No.658 of 2006 (Hemant D. Shah and others v. Chittaranjan D. Shah and others) wherein we held thus-

> "8. That the respondent No.8 is not party, to the arbitration proceedings, is not in dispute. It could not be because it is not party to the arbitration agreement. The question is, in a dispute between the two parties to the arbitration agreement if the property belonging to the third party is brought in dispute, can such property belonging to third party be said to be the subject matter of dispute between the parties to the agreement. We do not think so. The forum of Arbitral Tribunal is chosen by the parties to the agreement for resolution of disputes amongst them. Obviously, in such proceeding the rights of third party in the property in which the parties to the arbitration agreement has no right, title or interest, cannot be affected. It needs no elaboration that the arbitration proceeding is not to adjudicate an action in rem i.e., the determination of the status of a particular thing that binds all persons. Rather it is adjudication inter parties. By no stretch of imagination, in arbitration proceedings, pursuant to the memorandum of understanding between the appellants and the respondent Nos.1 to 6, the status of the property owned by respondent No.8 viz. Rs.5,00,00,000/- (Rupees five crores) lying in surplus on sale of Worli property can be determined. In other words, in respect of the property in which neither of the parties to the agreement has any right, interest or title cannot be the subject matter of dispute in the pending arbitration proceedings between the parties. If what cannot be done finally on the conclusion of the arbitration proceedings, surely it cannot be done in the proceedings

> under section 9 of the Arbitration Act which is in aid of the final award that may be passed by the Arbitral Tribunal. In this view of the matter, the amount of Rs.5,00,00,000/- (Rupees five crores) lying in the Debts Recovery Tribunal as surplus of sale proceeds of the Worli property belonging to respondent No.8 is not and cannot be a subject matter of dispute in the arbitration proceeding. The prayer for interim relief made by the appellants under section 9 with regard to the said property, in our view, was wholly misconceived and cannot be said to have been wrongly rejected by the learned Single Judge."

7. The senior counsel for the appellants then relied upon the judgment of the Supreme Court in the case of Firm Ashok Traders and another v. Gurumukh Das Saluja and others, AIR 2004 SC 1433 wherein the following observations have been made:-

> "..... the Court under S. 9 is only formulating interim measures so as to protect the right under adjudication before the arbitral Tribunal from being frustrated."

8. The judgment of the Kerala High Court in the case of Shoney Sanil v. M/s. Coastal Foundations (P) Ltd. & others, AIR 2006 Kerala 206 was also pressed into service by the senior counsel for the appellants. This is what the Kerala High Court said in Shoney Sanil:-

> ".....A reading of the said provision would show that the orders under Section 9(ii)(c) can be passed only in relation to the subject-matter of the dispute in arbitration which may be in the possession of any party since it is

> not the intention of the Act or any arbitration proceedings as conceived by the law of arbitration, to interfere with or interpolate third party rights. The reason for this is obvious, that, an arbitral tribunal rests its authority on the agreement between the parties to the arbitration agreement and it is not a Court, to interfere with third party rights, as may the Courts authorised in that regard, by the law of the land. The issuance of interim injunction or appointment of receiver provided for under clause (d) and the residuary provision to issue such interim measure of protection as may appear to be just and convenient in terms of clause (e) of Section 9(i) and (ii) have to be read in the backdrop of the extent of jurisdiction which can be exercised and, this is limited to the parties who are governed by the arbitral agreement and not in excess thereof. On a plain reading of Section 9 of the Act and going by the scheme of the said Act, there is no room to hold that by an interim measure under Section 9, the rights of third party, holding possession on the basis of a Court sale could be interfered with, injuncted or subjected to proceedings under Section 9 of the Act. Section 9 of the Act contemplates issuance of interim measures by the Court only at the instance of a party to an arbitration agreement with regard to the subject-matter of the arbitration agreement. This can be only as against the party to an arbitration agreement, or, at best, against any person claiming under him. The writ petitioner is a third party auction purchaser in whose favour is a sale certificate, followed by delivery of possession. He cannot therefore be subjected to proceedings under Section 9 of the Act, initiated on the basis of an alleged arbitral agreement between the respondents."

9. The senior counsel for the appellants also relied upon the judgment of the Supreme Court in the case of Anthony C. Leo

v. Nandlal Bal Krishnan and others, AIR 1997 SC 173 and the Division Bench judgment of this court in the case of Credible Trading and Investment Ltd. and another v. Nandlal Balkrishna and others, 2000(4) Mh.L.J. 165.

10. On the other hand, the counsel for the respondent No.1 supported the impugned order and relied upon the judgment of Delhi High Court in the case of Goyal MG Gases Pvt.Ltd. v. Air Liquid Deutschland GmbH and others (MANU/DE/0098/2005) wherein the Single Judge of Delhi High Court observed thus-

> "..... The plea of respondents No.2 and 3 that they being not party to arbitration agreement cannot be injuncted by invoking Section 9 of the Act cannot be sustained for the reason that while passing a restraint order or taking interim measures for protecting the subject matter or interests of the parties to the arbitration agreement, directions sometimes may be required to be issued to third parties even to ensure that no violation takes place pending adjudication of disputes arising out of arbitration agreement. Moreover, when third parties are shown to have joined hands or acquired interest in the subject matter or a common identity hidden behind a corporate veil, directions may be issued to them also to ensure effective implementation and enforcement of the orders to protect the subject matter of dispute. In CIT v. Meenakshi Mills Ltd. reported in (1967) 63 ITR page-609, the Supreme Court had categorically held that may be from the juristic point of view, the company is a legal personality entirely distinct from its members and the company is capable of enjoying rights and being subjected to duties but in exceptional cases, the court is entitled to lift the veil of corporate entity and pay regard to the economic realities behind

> the legal facade. Again in State of U.P. And Ors. v. Renusagar Power Company reported in MANU/SC/0505/1988 it was held, in para 66, that in the expanding horizon of modern jurisprudence, lifting of corporate veil is permissible. Its frontiers are unlimited. It was observed that the aim of the legislation is to do justice to all the parties and the doctrine of lifting of corporate veil is expanding. Therefore, in all those cases where group companies constitute one economic entity the Court may instead of going by the separate legal entities of the companies look at the common economic entity of the group to which they belong. Regarding interim orders also under Section 9 of the Act against those who are not party to arbitration agreement, a learned Single Judge of this Court in CREF Finance Ltd. v. Puri Construction Ltd., and Ors. Reported in 2000 VI AD (Delhi) P-509 examined the issue and came to the conclusion that this plea cannot come in the way of the Court in granting an equitable relief when the circumstances call for it. This Court is also of the view that where there is commonality of interest between parties to arbitration agreement and some others, who are actively engaged in frustrating the legal rights of a party to the arbitration agreement, the interim measures under Section 9 of the Act may cover even non parties to the agreement with a view to ensure complete justice between the parties."

11. He also relied upon the following observation in the judgment of the Gujarat High Court in the case of Nirma Ltd. v. Lentjes Energy (India) Pvt. Ltd., First Appeal No.5252 of 2001, decided on 26th July, 2002 :

> "..... Therefore, as on today, the respondent No.2 is held to be not amenable to the jurisdiction of the Arbitral tribunal since it

> was not a signatory to the arbitral clause contained in any of the three agreements with the respondent No.1. However, that aspect is quite distinct from the power of the court to grant interim measures under section 9 of the Act, which may extend even against the third party."

12. Though the senior counsel for the appellants argued at quite some length and cited the afore-referred judgments in support of the appellants' case that in the dispute between the parties to the partnership agreement, no order could have been passed against the third party (the appellants) affecting their rights under the independent licence agreements, we are of the view that looking to the order that has been passed by the learned Single Judge, detailed discussion in this regard is not necessary. By the impugned order, the learned single Judge has ordered appointment of the Receiver in respect of the business of the respondent No.2 firm. Obviously, the appellants cannot have any objection to this order. The appellants are not concerned with the business of the firm. The appointment of the Receiver is in respect of the respondent No.2 firm which, by no stretch of imagination, can be said to be affecting the rights of the appellants. The appellants have no concern whatsoever in the business of the firm. Further direction by the learned Single Judge in his order that the Receiver shall take possession of the business and assets of the firm from whomsoever is in possession, also does not call for any interference as it goes without saying that when the learned Single Judge directed the Receiver to take possession of the business and assets of the firm from whomsoever it may be in possession, obviously it has to be in accordance with law. It is important to notice here that though the appellants contended before us that the

premises where the business of the firm was being carried out were surrendered to the owners by the managing partner and that by an independent licence agreement entered into between the owners of the premises and the appellants, the premises came in possession of the appellants on leave and licence basis, no such agreement was produced before the learned single Judge nor the said agreement is on record. Similarly in so far as the furniture of the firm is concerned, the Receiver can always retrieve it from the appellants and, if necessary, by terminating licence agreement allegedly executed by the managing partner. Be that as it may, we have already clarified the legal position that in compliance of the direction of the learned single Judge that Receiver shall take possession of the business and assets of the firm from whomsoever it may be in possession, the Receiver shall proceed in accordance with law.

13. With the aforesaid clarification, we dismiss the appeal. If the appellants are aggrieved by any action of the Court Receiver which in their opinion is not in accordance with law or this order, they are free to apply to the learned Single Judge.

(R.M.LODHA, J.)

(S.A.BOBDE, J.)